



NATIONAL ASSOCIATION of STATE ELECTION DIRECTORS

Thank you for the chance to provide feedback on the Requirements for Version 2.0 of the Voluntary Voting System Guidelines (VVSG 2.0). The VVSG 2.0 represents an important advancement in modern voting system standards that election vendors can apply to build trustworthy, secure voting systems in which voters and election officials can have confidence.

The National Association of State Election Directors (NASED) represents all 50 states, the District of Columbia, and the five U.S. territories: American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands. Our members serve on the Election Assistance Commission's (EAC) Technical Guidelines Development Committee (TGDC), the EAC Board of Advisors, and the EAC Standards Board; NASED itself had a VVSG Committee from 2012 to 2015, when there was no quorum at the EAC, to discuss solutions for moving the standards development process forward.

NASED's role on these bodies and in the development of the VVSG makes us uniquely suited to weigh in on the process that has gotten version 2.0 to this point. Without changes, the VVSG process, which has failed election officials before, will continue to do so in the future.

The TGDC approved the Principles and Guidelines in September 2017 and the Standards Board and Board of Advisors approved them in April 2018. All three bodies approved a bifurcated structure, in which the Principles and Guidelines are subject to a vote by the commissioners and the Requirements are maintained by EAC staff in consultation with experts from the National Institute of Standards and Technology, the accessibility community, election officials, the private sector, and others. The Principles and Guidelines cannot stand on their own to build a voting system, nor were they designed to; they are principles of appropriate system characteristics and guidelines for the application of those principles. Separating the standards into two documents – a structure originally discussed by the TGDC in 2015 and ultimately approved by the TGDC in 2017 and the Standards Board and Board of Advisors in 2018 – assures that high-level Principles and Guidelines for how a voting system should operate remain static, while the Requirements for how a system can achieve those objectives remain flexible to adapt to changing technologies and security realities.

In September 2019, the EAC notified the TGDC that it received a legal opinion stating that they could not move forward with the proposed structure. The EAC stated that, while the documents could be separate, both must go through the Help America Vote Act (HAVA) process, including a 90-day public comment period, a



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public hearing, and adoption by the commissioners¹. At the time of this writing, however, EAC commissioners have still not adopted a policy codifying that opinion. We are sensitive to the staffing changes at the agency but believe it is important, both for present and for future conversations, to settle this issue. We have been clear that the NASED Executive Board does not agree that both the Principles and Guidelines and the Requirements must go through the HAVA process², but we ask that you put an end to this part of the conversation once and for all.

The public comment period for the Principles and Guidelines was from February 28 to June 7, 2019. During that time, EAC commissioners held three public hearings in which they heard testimony from state and local election officials, voting system manufacturers and test labs, and others. At the NASED 2020 Winter Conference on February 1, 2020, then-Vice Chair Hovland committed to voting on the Principles and Guidelines “soon.” There has still been no vote.

Operating as though the Principles and Guidelines and the Requirements are both subject to the HAVA process, now-Chairman Hovland has spoken several times of his desire to have an annual clean-up process for the VVSG Requirements. Such a process would allow the TGDC and other applicable bodies to regularly review and update the Requirements as security and technology dictate. While we have made clear our preference for a process in which this is not necessary, this is an acceptable compromise and meets our only goal: up-to-date voting system standards. The commissioners, however, have not voted to adopt this as policy³. We encourage them to do so to demonstrate their commitment to the needs of the election community.

We remain concerned that the EAC may lack a quorum again and what that could mean for the future of the VVSG if both the Principles and Guidelines and the Requirements must go through the HAVA process. We strongly encourage the EAC to adopt a policy to ensure that the VVSG does not stagnate in the event of no quorum. This is not without precedent.

¹ [Transcript of the 2019 TGDC meeting](#), September 19-20, 2019 in Silver Spring, Maryland. See page 42.

² The NASED Executive Board public comment on the Principles and Guidelines is [available on](#) the NASED website.

³ The TGDC unanimously [adopted a resolution](#) in support of an annual expedited VVSG review process at their meeting on September 20, 2019. TGDC resolutions are non-binding on EAC policy.



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In version 2.0 of the Testing and Certification Program Manual⁴, which was effective May 31, 2015 after a unanimous vote of the three commissioners at that time, EAC staff are designated the authority to:

- Issue guidance and explanation on the current voting system requirements and procedures through a Notice of Clarification;
- Interpret voting system requirements via a Request for Interpretation; and,
- Make certification decisions about voting systems.

While these authorities apply when the EAC has a quorum, each of these has been used in the past to advance the certification program in the absence of a quorum so that states were not left without untested or uncertified systems. Further, the 2019 Notice of Clarification issued by EAC staff regarding the Windows 7 sunset also gives staff the authority to determine whether a proposed change to a voting system constitutes a de minimis change and thus does not need to be recertified.

EAC staff already have the authority to offer guidance on the existing requirements, clarify requirements, determine when systems must be recertified, and certify systems both when there is and is not a quorum of commissioners. It stands to reason that they would be qualified to work with experts to make necessary changes to the Requirements in the absence of a quorum as well.

We are not suggesting that EAC staff make changes to system Requirements at their leisure. Election officials, manufacturers, and test labs need a standard they can rely on, so any Requirements update process must be methodical, transparent, and clearly defined. Developing such a procedure is achievable and, in our minds, necessary. This must be a priority for the agency.

We are a diverse Board. We are of different political parties, our states administer elections in different ways, we come from different backgrounds and experiences, and some of us work for Chief Election Officials while others are Chief Election Officials themselves. We unanimously agree: voting system standards are not political. The development of the VVSG 2.0 has been a bipartisan, collaborative process that has showcased the teamwork and partnership that the election administration community regularly brings to bear on intractable problems.

⁴ The Testing & Certification Program Manual version 2.0 is available on the [EAC website](#). See 1.6.2.1, chapter 9, and 1.16 “Testing and Certification Decisions Authority.”



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We recognize that this focus on process over content may strike some as misplaced, but it is the process that has derailed the VVSG in the past. We cannot look to the future without reconciling the problems that have plagued our work before. Agreement on content without agreement on process asks election officials, manufacturers, and voters to place our collective faith in a system that has repeatedly denied us the modern voting system standards that we uniformly agree are desperately needed. Without policy changes to the process, federal standards will not keep up with modern technology and we will find ourselves in this same position in the future.

Lori Augino, President, NASED
Michelle Tassinari, Incoming President, NASED
Steve Trout, Vice President, NASED
Meagan Wolfe, Treasurer, NASED
Jared Dearing, Secretary, NASED
Keith Ingram, Immediate Past President, NASED
Wayne Bena, Midwest Regional Representative, NASED
Christopher Piper, Southern Regional Representative, NASED
Rob Rock, Northeast Regional Representative, NASED
Wayne Thorley, Western Regional Representative, NASED
Judd Choate, NASED President, 2017-2018
Linda Lamone, NASED President, 2004-2005

Chairman Benjamin Hovland
Vice Chair Donald Palmer
Commissioner Thomas Hicks
Commissioner Christy McCormick
U.S. Election Assistance Commission

February 2, 2020

Dear Chair Hovland, Vice Chair Palmer, Commissioner Hicks and Commissioner McCormick,

By making dramatic last-minute changes to the draft Voluntary Voting System Guidelines 2.0, and posting them only one week before the public hearing at which the Election Assistance Commission (EAC) is scheduled to vote, the EAC is violating Section 222 of the Help America Vote Act (HAVA), 52 U.S.C. § 20962. As a result, the EAC is disregarding years' worth of carefully-developed advice so that it can rush adoption of severely weakened guidelines, not only violating HAVA but placing the security and reliability of America's elections at risk.

We urge the EAC to disregard the changes that were made outside of the HAVA prescribed process to the proposed Voluntary Voting System Guidelines 2.0 and Requirements, and instead vote on the Guidelines and Requirements that were developed and approved by the Technical Guidelines Development Committee, subject to three public hearings, and approved by the EAC's Board of Advisors and Standards Board.

I. Legal framework

The EAC is required by HAVA to promulgate voluntary voting system guidelines. Section 222 of HAVA prescribes a multi-step technical and public input process for adoption of these guidelines. These technical and public input processes are designed to ensure that the EAC acts with the best possible input from technical experts (both on and off its official boards) and the general public.

A. Technical input

First, the Technical Guidelines Development Committee provides recommendations to the EAC's Executive Director, which the Executive Director "shall take into consideration." 52 U.S.C. § 20962(b)(1); *see also id.* § 20961(b)(1).

Next, the Executive Director "shall submit the guidelines proposed to be adopted under this subpart (or any modifications to such guidelines) to the Board of Advisors." *Id.* § 20962(b)(2). In similar manner, the Executive Director "shall submit

the guidelines . . . to the Standards Board,” which itself undergoes a two-step review involving first its Executive Board, then the full Standards Board. *Id.* § 20962(b)(3). Both boards must submit comments and recommendations to the EAC. *Id.* § 20962(c).

Notably, even though both the Standards Board and the Board of Advisors are already represented on the Technical Guidelines Development Committee, *see id.* §§ 20961(c)(1)(A)(i)-(ii), Congress found it important to require the Executive Director to seek the feedback of the full boards—and to prohibit the EAC from voting to adopt final guidelines until it has given these boards 90 days to review and comment on the proposed guidelines and has “tak[en] into consideration” their comments and recommendations. *See id.* §§ 20962(d)(1)-(2).

B. Public input

In addition to the technical input process, HAVA also requires an opportunity for public notice and comment comparable to that applicable to other administrative rulemaking frameworks, such as the Administrative Procedure Act, 5 U.S.C. § 553. Under Section 222(a) of HAVA, the final adoption of guidelines or modified guidelines must include:

- (1) Publication of notice of the proposed guidelines in the Federal Register.
- (2) An opportunity for public comment on the proposed guidelines.
- (3) An opportunity for a public hearing on the record.
- (4) Publication of the final guidelines in the Federal Register.

52 U.S.C. §§ 20962(a)(1)-(4).

II. The VVSG Requirements have been legally recognized by the EAC as subject to the development framework outlined in HAVA.

When the EAC initiated the development of the VVSG 2.0, it expressed its intention to develop a high-level set of principles and guidelines which would serve as the VVSG. The EAC also described its intention to develop Requirements for the VVSG separate from the Guidelines, which would not be subject to the development process specified in HAVA.

At a September 2019 meeting of the Technical Guidelines Development Committee, Commissioner Hovland informed the Committee that the EAC had sought a legal opinion on its plan to separate the Requirements from the Guidelines. Commissioner Hovland explained that the EAC’s counsel determined that the

Requirements may be a separate document, but that the Requirements still must comply with the Help America Vote Act and its procedures.¹

Indeed, the EAC painstakingly followed the HAVA-prescribed procedures and processes for the development of the Requirements for years. The EAC itself defines the VVSG as a “set of specifications and requirements against which voting systems can be tested to determine if the systems meet required standards.”² By the EAC’s own reckoning, the document under consideration for the February 10 vote is subject to all the steps outlined in HAVA. However, as set forth in more detail below, the EAC’s recent actions plainly violate HAVA’s procedures.

III. The EAC’s failed process with VVSG 2.0

The EAC diligently followed HAVA’s direction for years, and then summarily disregarded HAVA’s clear procedural instructions for the VVSG 2.0 Requirements. The following recap of the VVSG 2.0 development process demonstrates how the EAC failed.

July 20-21, 2015 After being dormant for years, a re-constituted Technical Guidelines Development Committee (TGDC) meets to begin developing the next iteration of the VVSG, designated 2.0. The EAC outlined a plan to develop a high-level set of “principles and guidelines” that constitute the VVSG 2.0 and would go through the HAVA-mandated adoption process, and a set of VVSG 2.0 “requirements” that would go through a separate but non-statutory process that would mirror the HAVA process.

Nov. 18, 2015 National Institute of Standards and Technology (NIST) and EAC launch public working groups for the development of the VVSG. Public working groups were initiated to allow for public input *during* the development of the VVSG, on the front end, rather than develop VVSG and have to address a large volume of public comments after the draft is completed. Groups include cybersecurity, accessibility, pre-election testing and post-election auditing. Members of the public, academia and the vendors participate.

¹ See EAC, Transcript, “United States Election Assistance Commission, Technical Guidelines Development Committee Meeting” (Sept. 19-20, 2019), at 41-43 (statement of Commissioner Hovland), *available at* <https://www.eac.gov/sites/default/files/2020-01/EAC09192019VerbatimTGDC%20%282%29.pdf>.

² See EAC, “Voluntary Voting System Guidelines,” *available at* <https://www.eac.gov/voting-equipment/voluntary-voting-system-guidelines>.

Feb. 9, 2016	TGDC meeting on creation of new VVSG Principles and Guidelines.
July 2016	VVSG cybersecurity public working group kick-off meeting led by NIST. Groups meet semi-weekly, weekly and eventually bi-weekly over the next three years. Other groups begin meeting as well.
Feb. 28, 2017	Public comment period on high level Principles and Guidelines begins.
June 7, 2017	Public comment period on high level Principles and Guidelines closes.
Sept. 11-12, 2017	TGDC adopts high level VVSG 2.0 Principles and Guidelines, a five-page document of fundamental voting system principles.
Apr. 22-24, 2018	Standards Board and Board of Advisors meet and approve high level Principles and Guidelines.
Sept. 19-20, 2019	The EAC notified the TGDC that it received a legal opinion stating that the EAC could not move forward with the bifurcated proposed structure of Principles and Guidelines and Requirements. The EAC stated that, while the documents could be separate, both must go through the HAVA process, including a 90-day public comment period, a public hearing, and adoption by the commissioners. ³
Dec. 18, 2019	TGDC call to address accessibility and security issues including wireless provision in requirements.
Feb. 7, 2020	Finalized VVSG with requirements is passed unanimously by the TGDC.
Mar. 24, 2020	VVSG 2.0 Principles and Guidelines and Requirements submitted for public comment.
Mar. 27, 2020	Public hearing on VVSG 2.0 Principles and Guidelines and Requirements.
May 6, 2020	Public hearing on VVSG 2.0 Principles and Guidelines and Requirements.

³ See *supra* note 1.

May 20, 2020	Public hearing on VVSG 2.0 Principles and Guidelines and Requirements.
June 16, 2020	Board of Advisors annual meeting; approves proposed VVSG 2.0 with Requirements.
June 22, 2020	Public comment period closes.
July 21, 2020	Standards Board meeting voted to approve draft VVSG 2.0 with Requirements. At this meeting EAC and NIST acknowledge that the EAC staff is meeting weekly with vendors to discuss changes to the VVSG 2.0 Requirements. ⁴
Jan. 26, 2021	EAC notices in the Federal Register a vote on the VVSG 2.0 Principles and Guidelines and Requirements for February 10, 2021 (16 days later). <i>See</i> 86 Fed. Reg. 7077. <i>The notice does not include a link to the draft on which the EAC will vote.</i>
Feb. 1, 2021	The EAC publishes the proposed VVSG 2.0 Principles and Guidelines and Requirements on its website. It contains substantial deletions and revisions, including a significant revision to permit wireless networking hardware and significantly weaken a provision for end-to-end verifiable systems which could be used to permit direct recording electronic equipment and/or internet voting.

IV. Conclusion

As the timeline above indicates, the process was functioning properly from 2015 well into the summer of 2020. The TGDC, the Board of Advisors, the Standards Board, and the general public all had substantial opportunities to provide feedback and comment on the proposed VVSG 2.0 Requirements, including through multiple public comment periods and public hearings. The Board of Advisors and the Standards Board approved the proposal.

Yet the EAC conducted a parallel, nonpublic process in which it apparently met in secret with vendors to discuss wholesale revisions to the guidelines that the EAC's own TGDC, Standards Board, and Board of Advisors had already approved. In the end, the EAC released a substantially weakened proposal, which differs in hundreds of material points from the painstakingly prepared draft approved by the EAC's own boards after extensive public feedback, just nine days before the EAC is

⁴ On August 3, 2020, Free Speech For People (FSFP) submitted a Freedom of Information Act request (#20-00039) seeking EAC communications with vendors regarding VVSG 2.0. After multiple agency delays, on January 19, 2021, FSFP filed an administrative appeal of the EAC's constructive denial of the FOIA request.

scheduled to take a final vote. This revised proposal will draw widespread condemnation from election and computer security experts and Congress, which the EAC attempted to avoid.

The EAC's attempted end-run around the Help America Vote Act and avoidance of public scrutiny endanger the security of America's elections and violate federal law. We urge the EAC to vote on February 10, 2021 only on the VVSG 2.0 Requirements that were properly and legally developed.

Sincerely,

Ron Fein
Legal Director

Susan Greenhalgh
Senior Policy Advisor

cc: Chair and Members, U.S. Senate Committee on Rules and Administration
Chair and Members, U.S. House Committee on House Administration